BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BLANCA RODRIGUEZ	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,040,606
BEEF PRODUCTS INC.	)	
Respondent	)	
AND	)	
	)	
TRAVELERS INDEMNITY COMPANY,	)	
LIBERTY INSURANCE CORPORATION,	)	
VIRGINIA SURETY COMPANY, INC.,	)	
ST. PAUL FIRE & MARINE INSURANCE CO.	)	
and PHOENIX INSURANCE COMPANY	)	
Insurance Carriers	)	

BLANCA RODRIGUEZ	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,047,725
COLVIN CLEANING	)	
Respondent	)	
AND	)	
	)	
COLUMBIA NATIONAL INSURANCE COMPANY	)	
Insurance Carrier	)	

BLANCA RODRIGUEZ	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,047,726
GARDEN CITY TRAVEL PLAZA	)	
Respondent	)	
AND	)	
	)	
TRAVELERS INDEMNITY COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appeals the December 11, 2009, preliminary hearing Order of Administrative Law Judge Pamela J. Fuller (ALJ). Claimant was denied benefits from all respondents after the ALJ determined that claimant had failed to provide timely written claim within 200 days of the accident to respondent Beef Products, Inc. (BPI) and its insurance carriers Travelers Indemnity Company, Liberty Insurance Corporation and Virginia Surety Company, Inc., and failed to provide timely notice of her alleged injury claims to both respondent Garden City Travel Plaza (GC Travel) and its insurance carrier Travelers Indemnity Company and respondent Colvin Cleaning Service (Colvin) and its insurance carrier Columbia National Insurance Company. Claimant's request for medical treatment and temporary partial disability compensation (TPD) was denied and claimant's claims in Docket No. 1,047,726 and Docket No. 1,047,725 were dismissed.

Claimant appeared by her attorney, Beth Regier Foerster of Topeka, Kansas. Respondent BPI and its insurance carriers Travelers Indemnity Company and Liberty Insurance Corporation appeared by their attorney, Matthew J. Schaefer/Dallas L. Rakestraw of Wichita, Kansas. Respondent BPI and its insurance carrier Virginia Surety Company, Inc., appeared by their attorney, Kevin J. Kruse of Overland Park, Kansas. Respondent GC Travel and its insurance carrier Travelers Indemnity Company appeared by their attorney, William L. Townsley, III, of Wichita, Kansas. Respondent Colvin and its insurance carrier Columbia National Insurance Company appeared by their attorney, L. Michael Higgins, Jr., of Garden City, Kansas. There were no appearances by the remaining insurance companies listed in the caption.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the deposition of Manual Chacon taken November 19, 2009, with attachments; the deposition of Linda Guhr taken November 19, 2009, with attachments; the deposition of Jeff Crocker taken November 19, 2009, with attachments; the transcript of Preliminary Hearing held December 7, 2009, with attachments; and the documents filed of record in this matter.

ISSUES

Docket No. 1,040,606

1. Did claimant suffer personal injury by accident which arose out of and in the course of her employment with respondent BPI on the date or dates alleged? Respondent acknowledges that claimant suffered an accidental injury on March 2, 2001, when she fell down a stairway at respondent's plant. However, claimant alleges a series of aggravations to her low back and right shoulder while continuing

to work for respondent through her last day on August 17, 2007. Respondent BPI contends that claimant failed to request medical treatment or advise respondent of ongoing problems for the last five years she worked for respondent. Therefore, respondent contends that claimant's allegations of a series of accidents through her last day worked are not supported by this record.

2. Did claimant provide timely written claim of this accident? Respondent BPI contends claimant's written claim was not submitted in this matter until June 11, 2008, when respondent BPI received a letter from claimant's attorney and when the E-1 Application For Hearing was filed in this matter. Respondent BPI contends that if claimant did suffer a series of accidents during her employment, the appropriate date of accident would be October 24, 2002, when Jeff Crocker, respondent BPI's human resource and safety manager, met with claimant to discuss the permanent restrictions placed on claimant by Michael J. Baughman, M.D., claimant's authorized treating physician. Claimant contends that she suffered a series of accidents through August 17, 2007, claimant's last day worked with respondent BPI. Claimant further contends that the appropriate date of accident under K.S.A. 44-508(d) would be September 18, 2009, the date claimant's attorney sent a letter to respondent BPI requesting medical treatment. Therefore, the letter of September 18, 2009, not only establishes the date of accident, but also provides timely written claim in this matter.

3. Did claimant fail to file a timely application for hearing in this claim with the Kansas Workers Compensation Division (Division) pursuant to K.S.A. 44-534? The E-1, Application For Hearing, was filed in this matter on June 11, 2008.

4. Is claimant entitled to ongoing medical treatment for the injuries suffered while employed with respondent BPI? Does the Board have jurisdiction over this issue on appeal from a preliminary hearing order?

5. Is claimant entitled to TPD? If so, what are the dates and amounts for which TPD are due? Does the Board have jurisdiction over this issue on appeal from a preliminary hearing order?

Docket No. 1,047,725

1. Did claimant meet with personal injury by accident which arose out of and in the course of her employment with respondent Colvin? Claimant worked for respondent Colvin either at the end of April or the beginning of May 2008, for a period of approximately one week totaling 38 hours. Claimant contends that she aggravated her low back and right shoulder condition from the physical labor performed for respondent Colvin. Respondent Colvin argues that claimant's conditions preexisted

her employment and any aggravations were temporary at best. Any permanent disability stems from claimant's employment with respondent BPI.

2. What is the date of accident? Claimant argues that she suffered a series of accidents during the entire time she was employed for respondent Colvin. Further, pursuant to K.S.A. 2009 Supp. 44-508(d), claimant's date of accident would be August 11, 2009, the date claimant's counsel received the independent medical evaluation report of Terrence Pratt, M.D., the court ordered independent medical examiner (IME) doctor. Respondent Colvin argues that the report of Dr. Pratt fails to diagnose an injury from claimant's employment with this respondent Colvin.

3. Was notice timely provided? If claimant did suffer accidental injury with this respondent, and if the accident date is August 11, 2009, as alleged by claimant, respondent Colvin contends notice was not provided until September 18, 2009, the date a claim for compensation was actually made.

4. If notice was not timely submitted, was there just cause for claimant's failure to provide said notice?

5. Is claimant entitled to ongoing medical treatment for her low back and right shoulder as the result of her work-related injuries suffered while working for respondent Colvin? Does the Board have jurisdiction of this issue on appeal from a preliminary hearing?

6. Is claimant entitled to TPD? Does the Board have jurisdiction over this issue on appeal from a preliminary hearing?

7. Did the ALJ exceed her jurisdiction in dismissing this claim?

Docket No. 1,047,726

1. Did claimant suffer personal injury by accident which arose out of and in the course of her employment with respondent GC Travel? Claimant worked for respondent GC Travel from April 17, 2008, through April 23, 2008, and alleges a series of accidental injuries during the period of her employment. Respondent GC Travel contends claimant's ongoing physical problems stem from her employment with respondent BPI, and not from GC Travel. Additionally, approximately one week after leaving GC Travel, claimant began her employment with Colvin, where she cleaned toilets and used a vacuum cleaner. Claimant left Colvin after suffering ongoing pain in her back and right shoulder. Respondent GC Travel contends claimant suffered only a temporary aggravation of her back and shoulder injuries

while with GC Travel and any permanent disability stems from her long-term employment with respondent BPI.

2. What is the date of accident? Claimant contends that she suffered a series of injuries the entire time she was employed with GC Travel. Additionally, claimant contends that the appropriate date of accident would be August 11, 2009, the date claimant's counsel received the report of Dr. Pratt, noted above. Respondent GC Travel contends claimant suffered no injury during her seven-day term of employment with respondent GC Travel or, at most, suffered only a temporary aggravation of the low back and shoulder conditions. Additionally, respondent GC Travel contends that there is no medical evidence supporting a finding that claimant suffered an accidental injury while working for this respondent.

3. Was notice timely provided? If claimant did suffer accidental injury with this respondent, and if the accident date is August 11, 2009, as alleged by claimant, respondent GC Travel contends notice was not provided until September 18, 2009, the date a claim for compensation was actually made.

4. Is claimant entitled to medical treatment for these conditions? Respondent GC Travel contends the Board is without jurisdiction to consider these issues on an appeal from a preliminary hearing.

5. Is claimant entitled to TPD? Does the Board have jurisdiction over this issue on appeal from a preliminary hearing?

6. Did the ALJ exceed her jurisdiction in dismissing this claim?

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed in part and reversed in part.

Claimant, a long-term employee of respondent BPI, fell down a flight of stairs on March 2, 2001, injuring her low back and right upper extremity to the level of her shoulder. Claimant ultimately came under the care of Michael J. Baughman, M.D., of Sandhill Orthopaedic and Sports Medicine. Dr. Baughman treated claimant conservatively, and respondent BPI's records indicate claimant was returned to her regular job on April 5, 2001, without restrictions. An internal accident report was created by respondent BPI, and an Employer's Report Of Accident was prepared and filed with the Kansas Division of Workers Compensation on March 23, 2001. An E-1, Application For Hearing, was filed by claimant with the Division on June 11, 2008, alleging a series of accidents from March 2, 2001, through claimant's last day of employment through August 2007. (This record

reflects that claimant's last day of employment with this respondent was August 17, 2007.) This accident claim was assigned Docket No. 1,040,606.

On March 8, 2002, claimant again complained of right upper extremity pain, including the right shoulder. Another internal report of accident was prepared, and respondent BPI filed another report of the accident with the Division dated March 13, 2002. Claimant was again referred to Dr. Baughman and again received conservative treatment. Claimant continued to work light duty. She was returned to work at maximum medical improvement on October 24, 2002. Dr. Baughman provided restrictions on that date which limited claimant's use of her right shoulder at or above shoulder level to an occasional basis, lifting was limited to less than 60 pounds and pushing and pulling to less than 110 pounds. These restrictions were permanent. Jeff Crocker, respondent BPI's human resource and safety manager at that time, met with claimant regarding the restrictions of Dr. Baughman. Claimant was advised of the restrictions through the use of an interpreter.

Claimant's job with respondent BPI, identified as an upstairs sorter, required that she pull and throw pieces of meat, occasionally using a hook. Claimant also would scrape a belt to remove pieces of meat, build boxes and remove partially frozen pieces of meat from a combo box, which was a large box containing many pieces of meat. The combo would normally empty onto a belt from which claimant and other workers would sort the product into various containers. The job was not heavy, but was repetitive. Claimant and the other workers would rotate from job to job, performing the various activities for about one hour on each job.

On November 7, 2002, claimant again complained of pain in her right upper extremity to the shoulder. She reported that the drum scraper job caused her pain. Mr. Crocker again met with claimant and the restrictions were again discussed. It was explained that the jobs claimant was working did not violate her restrictions. It is noted that claimant has denied knowing of these restrictions until 2008. Claimant also denies meeting with Mr. Crocker, although she did talk to someone regarding the job but does not remember the actual conversation. Mr. Crocker testified that the sorter jobs being worked by claimant did not require work at or above her shoulder level for more than a portion of the hour claimant would work the boxing job. Additionally, the sorter jobs at the belt did not require work at or above claimant's shoulder level. Claimant testified that she would, at times, complain of pain in her upper extremity to the shoulder and would be sent to the nurse with Tyson. At the time, respondent BPI did not have its own nurse's station. No records were maintained by the Tyson nurses regarding how many times claimant was treated with ice and/or heat for pain.

Manuel Chacon Pradeo (Mr. Chacon), respondent BPI's A shift supervisor, testified that the tasks associated with claimant's jobs with the upstairs sorter position did not

violate the restrictions placed on claimant by Dr. Baughman. Claimant did not lift over 60 pounds at any time, did not push or pull at or over 110 pounds at any time, and rotated the various jobs, working about one hour per position. The only job which required claimant to reach overhead was the boxing job, which claimant worked for about one hour per day. Claimant did assist in dumping the combo boxes. This required that claimant occasionally unload meat from the combo with a hook. Mr. Chacon testified that the meat being moved did not weigh more than 10 pounds. Mr. Chacon did not remember discussing the restrictions from Dr. Baughman, but he did remember discussing restrictions from a doctor.[1]

Claimant continued on this job, working without complaint, until December 21, 2006. On that date, an accident report was prepared discussing right upper extremity pain to the level of the forearm. On February 4, 2007, another accident report was prepared on claimant. Claimant had been trying to move a combo when her right elbow popped. Mr. Chacon testified that the combo box weighed about 40 pounds empty. The weight would increase depending on the amount of meat in the box. Claimant was taken to the nurse's station at Tyson and treated with ice, heat and pain medications.

Claimant continued with respondent BPI in the upstairs sorting job until August 17, 2007. Claimant went on a planned vacation on that date and was scheduled to return to work on August 28, 2007. However, claimant failed to return to work on August 27, 28 or 29, 2007. On August 29, 2007, claimant was determined to be a "voluntary quit" and her employment with respondent BPI was terminated. After her termination, claimant obtained employment at a cosmetics plant, called Burt's Bees, in 2008. Claimant continued to have problems with her back and right shoulder during this time. Claimant left that employment when Burt's Bees moved its plant. Claimant then moved to Arkansas and began working for Simmons Poultry, pressing air out of bags of chickens. Claimant left that employment due to pain in her back and right shoulder. Claimant returned to Kansas, taking a job at GC Travel where she worked from April 17, 2008, through April 23, 2008. Claimant worked that job with no restrictions. But she left due to the job being too hard. She received no medical care from GC Travel while working there. Claimant then obtained a job with Colvin where she worked a total of 38 hours in late April or early May 2008. Her job duties included washing and cleaning toilets and vacuuming. Claimant left Colvin due to back and right arm pain. She requested no medical treatment during her employment with Colvin. Since leaving Colvin, claimant has been babysitting for her daughter-in-law's two children, feeding them and changing the younger child's diapers. Claimant filed claims against GC Travel and Colvin on October 2, 2009, alleging injuries to her low back and right upper extremity to the level of the shoulder.

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[1] Chacon Depo. at 44.

Claimant was referred by her attorney to board certified orthopedic surgeon C. Reiff Brown, M.D., for an evaluation on December 2, 2008. Claimant was diagnosed with rotator cuff tendonitis and impingement and a possible rotator cuff tear, all in the right shoulder. She was also diagnosed with an aggravation of preexisting degenerative arthritic changes in the lumbar area of the spine. Dr. Brown determined that claimant's injuries were the result of her work activities with respondent BPI and not from the later employment after August 2007 with GC Travel and Colvin, which he considered to be only temporary aggravations. He made several recommendations for ongoing and needed medical treatment for claimant.

Claimant was referred by the ALJ to board certified orthopedic surgeon Terrence Pratt, M.D., on June 1, 2009. Claimant was diagnosed with arthrosis and tendinitis of the right shoulder and pain in the low back with a history of spondylosis. Based on a history void of any employment after claimant left respondent BPI, Dr. Pratt determined that claimant's symptoms are related to her employment with respondent BPI from 2001 through August 2007. The history provided by claimant indicated her lack of knowledge regarding the restrictions placed on her by Dr. Baughman. Dr. Pratt was provided information in August 2009 regarding the various jobs held by claimant after her termination of employment with respondent BPI. He was interested in the fact claimant had left various jobs after respondent BPI due to low back and right arm involvement. However, he noted that when claimant left respondent BPI in 2007, it was not due to her injuries. He felt the cleaning job worked by claimant after leaving respondent BPI could have aggravated her lumbosacral problems. He still stated that the work for respondent BPI, which he believed was without restriction, could have aggravated the underlying problem in claimant's right shoulder.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2009 Supp. 44-523(f) states:

> Any claim that has not proceeded to final hearing, a settlement hearing, or an agreed award under the workers compensation act within five years from the date of filing an application for hearing pursuant to K.S.A. 44-534, and amendments thereto, shall be dismissed by the administrative law judge for lack of prosecution. The administrative law judge may grant an extension for good cause shown, which shall be conclusively presumed in the event that the claimant has not reached maximum medical improvement, provided such motion to extend is filed prior to the five year limitation provided for herein. This section shall not affect any future benefits which have been left open upon proper application by an award or settlement.

K.A.R. 51-18-6 states:

> An application for review by the workers compensation board may be dismissed upon the agreement of all parties to the review. If a settlement is reached, the appellant shall promptly notify the workers compensation board.

The ALJ dismissed the cases against both GC Travel and Colvin after the preliminary hearing. The Workers Compensation Act (Act) does not contain a provision allowing the dismissal of a case unless by agreement of the parties or for lack of prosecution. Neither is the case here. The dismissal of claimant's claims against GC Travel in Docket No. 1,047,026 and Colvin in Docket No. 1,047,725 is reversed.

K.S.A. 44-534a grants the administrative law judge the authority to determine a claimant's request for temporary total disability and ongoing medical treatment at a preliminary hearing. The Board's review of preliminary hearing orders is limited to specific issues as set forth in the statute.

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to issues where it is alleged the administrative law judge exceeded his or her jurisdiction and the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?

2. Did the injury arise out of and in the course of employment?

3. Did the worker provide timely notice and written claim of the accidental injury?

4. Is there any defense that goes to the compensability of the claim?[2]

Claimant contests the denial of medical treatment and TPD in these matters. K.S.A. 44-534a allows an administrative law judge the jurisdiction to determine certain matters preliminarily without the opportunity for an appeal until the matter is fully settled. The statute does not allow the Board the jurisdiction to consider those matters on appeal from a preliminary hearing order. Here, the ALJ's ruling on both the ongoing medical care and TPD are preliminary matters to be determined within an administrative law judge's jurisdiction. The appeal on these issues will not be determined at this time and is dismissed.

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[2] K.S.A. 44-534a(a)(2).

Docket No. 1,040,606

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[3]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[4]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[5]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[6]

It is uncontradicted that claimant fell down a flight of stairs on March 2, 2001. She was treated conservatively and returned to work. Claimant continued to complain of problems, seeking treatment in March 2002 and again in November 2002. Both times she was treated conservatively and returned to work, with restrictions being provided by Dr. Baughman. Additionally, claimant testified to expressing complaints to her supervisor on several occasions after which she was sent to the nurse's station at Tyson. Accident Investigation Reports and/or Accident/Injury Investigation Reports were created by respondent BPI on December 21, 2006, and February 4, 2007, for the same

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[3] K.S.A. 44-501 and K.S.A. 2002 Supp. 44-508(g).

[4] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[5] K.S.A. 44-501(a).

[6] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

complaints and the same areas of the body originally injured in 2001 and 2002. This record supports a finding that claimant suffered a traumatic injury on March 2, 2001, and a series of aggravations through her last day worked on August 17, 2007.

When dealing with a series of injuries which occur microscopically over a period of time, the Kansas appellate courts have established a bright line rule for identifying the date of injury in a repetitive, microtrauma situation. The date of injury for repetitive injuries in Kansas has been determined to be either the last day worked or the last day before the claimant's job is substantially changed.[7]

The date of accident in microtrauma cases was, at one time, directed to the last day a worker experienced the traumas. In this instance, the date would have been the August 17, 2007, date. However, in 2005, the Kansas legislature amended the Act, creating a formula to be used to establish the date of accident when the accident occurs over a long period of time. As the series of accidents above determined extends beyond the date of the effectiveness of this new statute, K.S.A. 44-508(d) (as amended July 1, 2005), controls. As strange as the result is, the new statute applies in this matter. However, this result is no more strange than the result in *Saylor.*[8] In *Saylor*, the Court determined that statutory construction required a determination of legislative intent. When the legislature revises an existing law, the Court presumes that the legislature intended to change the law as it existed prior to the amendment. The Court went on to determine that a date of accident well beyond the claimant's last day worked was proper under the new language of the statute. This Board Member finds that a statute allowing a date of accident well beyond an employee's last day worked with the employer is no more illogical and absurd than a date of accident well prior to what appears to be the last day of aggravation. In *Saylor*, a minority of the Board argued that the result was illogical and absurd, but the Court rejected that argument. The Court must presume that the legislature intended the change as written.

K.S.A. 2005 Supp. 44-508(d) states:

> "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events,

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[7] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999); *Kimbrough v. University of Kansas Med. Center*, 276 Kan. 853, 79 P.3d 1289 (2003).

[8] *Saylor v. Westar Energy, Inc.*, 41 Kan. App. 2d 1042, 207 P.3d 275 (2009).

> repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

Claimant was provided restrictions by the authorized treating physician on October 24, 2002. Those restrictions were followed, as testified to by Mr. Chacon. Admittedly, claimant testified that the restrictions were violated, but the evidence supports a different conclusion. The jobs described by claimant, by Mr. Chacon and in Exhibit 2 to the Chacon deposition, do not support a determination that Dr. Baughman's restrictions were violated.

Additionally, this record supports a finding that when claimant was provided permanent restrictions by Dr. Baughman, the authorized treating physician, on October 24, 2002, those restrictions were discussed between claimant and her supervisor on more than one occasion. Pursuant to K.S.A. 2005 Supp. 44-508(d), this Board Member finds claimant's date of accident to be October 24, 2002.

> No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation. . . .[9]

Claimant contends the Accident Investigation Reports and/or Accident/Injury Investigation Reports of March 3, 2001, December 21, 2006, and February 4, 2007, constitute written claim for workers compensation purposes in Kansas. However, those reports appear to intend an investigation into an accident, without any request by claimant for ongoing treatment under the Act. In determining whether a writing is, in fact, a claim for compensation, the writing must be examined and a reasonable interpretation placed on it to determine what the claimant had in mind.

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[9] K.S.A. 44-520a(a).

> The question is, did the employee have in mind compensation for his injury when the instrument was signed by him or on his behalf, and did he intend by it to ask his employer to pay compensation?[10]

There is no indication on the Accident Investigation Reports and/or Accident/Injury Investigation Reports that claimant intended to request benefits under the Act. The Reports appear more intended to avoid such problems in the future. The Reports do state that claimant had been furnished first aid or had been referred to the nurse. No future medical treatment is indicated. Claimant filed an E-1, Application For Hearing, along with a letter from her attorney addressed to respondent BPI, on June 11, 2008. This is well outside the 200-day time limit set by the above statute. Claimant has failed to submit a written claim in a timely fashion. The denial of benefits by the ALJ in this matter is affirmed.

K.S.A. 534(b) states:

> No proceeding for compensation shall be maintained under the workers compensation act unless an application for a hearing is on file in the office of the director within three years of the date of the accident or within two years of the date of the last payment of compensation, whichever is later.

The E-1, Application For Hearing, was filed by claimant on June 11, 2008. Claimant last sought medical treatment for her right upper extremity, including the shoulder, on December 21, 2006, and again on February 4, 2007. Both would fall within the two-year limit set forth in K.S.A. 44-534(b). Claimant's application for hearing was timely.

Docket No. 1,047,725

Claimant contends she suffered aggravations of both her low back and right upper extremity while working for Colvin for a period of 38 hours. Claimant performed work which required physical labor while cleaning toilets and vacuuming floors. Claimant sought no medical treatment while performing these tasks. Claimant did testify that she left her employment with Colvin due to the pain being caused to her low back and right upper extremity. Dr. Brown did not find any permanent injury from these work activities. However, Dr. Pratt did state in his August 4, 2009, report that the cleaning activities described by claimant "could" result in an aggravation of claimant's low back problems. There was nothing in the report finding an aggravation within a reasonable degree of medical probability. Claimant's burden must be determined within a reasonable

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[10] *Fitzwater v. Boeing Airplane Co.*, 181 Kan. 158, 309 P.2d 681 (1957).

degree of probability. A possibility does not meet that criteria. This Board Member finds that claimant failed to prove that she suffered an accidental injury while working for Colvin.

This renders moot the remaining issues in this matter.

Docket No. 1,047,726

Claimant also worked for GC Travel for a period of about one week from April 17, 2008, through April 23, 2008. Claimant testified that she had to leave the GC Travel job because her back hurt. The only duties described at GC Travel involved washing dishes. Claimant neither sought nor requested medical treatment while working for GC Travel. Dr. Brown determined that none of the jobs worked by claimant after leaving respondent BPI resulted in any permanent impairment. Dr. Pratt discussed the duties at Colvin involving cleaning but failed to mention dishwashing as an aggravating factor. This Board Member finds that claimant has failed to prove that she suffered an accidental injury which arose out of and in the course of her employment with GC Travel. This renders moot the remaining issues in this matter.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[11] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

The Order of the ALJ is reversed with regard to the decision to dismiss claimant's claims in Docket No. 1,047,725 and 1,047,726, but is affirmed with regard to the decision to deny claimant benefits against the above respondents, although for the different reasons as set out above.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Pamela J. Fuller dated December 11, 2009, should be, and is hereby, reversed with regard to the dismissal of Docket No. 1,047,075 and 1,047,726, but is affirmed with regard to the denial of benefits to claimant in the above matters, although for the different reasons as set out above.

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[11] K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this ____ day of April, 2010.

HONORABLE GARY M. KORTE

c: Beth R. Foerster, Attorney for Claimant
Matthew J. Schaefer/Dallas L. Rakestraw, Attorney for Respondent Beef Products Inc. and its Insurance Carrier Travelers Indemnity Company and Liberty Insurance Corporation
Kevin J. Kruse, Attorney for Respondent Beef Products Inc. and its Insurance Carrier Virginia Surety Company Inc.
William L. Townsley, III, Attorney for Respondent Garden City Travel Plaza and its Insurance Carrier Travelers Indemnity Company
L. Michael Higgins, Jr., Attorney for Respondent Colvin Cleaning and its Insurance Carrier Columbia National Insurance Company
Pamela J. Fuller, Administrative Law Judge